STATE OF WISCONSIN
SUPREME COURT

Case No. 99-3297-OA

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC., JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST, STEVEN URSO and STATE ENGINEERING ASSOCIATION, by its President, THOMAS H. MILLER, DAVID BUSCHKOPF, ROSS JOHNSON, MELVIN SENSENBRENNER, BERNARD KRANZ and THOMAS H. MILLER,

Petitioners,

v.

GEORGE LIGHTBOURN, Secretary of the Wisconsin Department of Administration, JACK C. VOIGHT, Wisconsin State Treasurer, WISCONSIN EDUCATION ASSOCIATION COUNCIL, by its President TERRY CRANEY and its Vice-President STAN JOHNSON, and DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN and PHYLLIS POPE,

Respondents.

WEAC's REPLY TO SEA's AND STATE RESPONDENTS' RESPONSES TO "MOTION FOR INTERMIM RELIEF"

Respondents Wisconsin Education Association Council, et al. ("WEAC"), respectfully responds to the

responses filed by the Petitioner State Engineering Association ("SEA") and Respondents George Lightbourn, et al. ("State Petitioners"), to WEAC's "Motion for Interim Relief Pending Final Resolution by the Court." Both responses argue that certain provisions of Act 11 are not severable from the Act's funding mechanisms and thus the injunction as to those provisions should not be dissolved. First, if the Court has concluded that Act 11's transfer of $4 billion from the transaction amortization account (TAA) is constitutional (even if the Court is not prepared to rule on all issues raised by Petitioners), there is no reason to confront the severability concerns raised by the SEA and State Respondents. The likelihood of success on the merits for the provisions at issue in WEAC's motion will be assured. Second, even if the severability issue needs to be addressed, as is set forth below there is no basis for the assertion that the provisions at issue are funded by the transfer of $4 billion from the TAA or by the changes in actuarial assumptions opposed by Petitioners in this matter.

The benefits at issue in WEAC's motion for partial dissolution of the injunction are all prospective in nature. They are not funded by the $4 billion transfer. Any additional "costs" that result will be in the future and will be incorporated into the statutory actuarial accounting and rate setting mechanisms already in place. They are entirely independent of the $4 billion transfer of Act 11; they can be severed from the transfer without upsetting any overall plan of the legislature.

I. SECTION 25 IS NOT DEPENDENT ON FUNDING CREATED BY ACT 11.

WEAC believes there is no basis for SEA's assertion that Section 25 of Act 11 is dependent on Act 11's funding mechanism.[1] Section 25 provides for a death benefit of all monies deposited in an employee's account in the employee reserve, as well as an equal amount form the employer reserve, on the death of that

[1] The SEA's response also argues that Section 25 violates Article IV, Section 26, of the Wisconsin Constitution. This is an argument raised in the SEA's main brief (although not addressed in oral argument). This challenge was addressed in WEAC's brief, pp. 767-74, and State Respondents' brief, pp. 88-92. Furthermore, as is set forth below, even if increased funding is necessary to provide Section 25 benefits, it is already by the statutory structure already in place.

employee if the employee dies before age 55. Previously, such an employee only had the right to a death benefit that equaled his or her (the employee's) contributions to the WRS; employer contributions made on behalf of that employee were not paid out to the employee if he or she died prior to age 55.

Although an increased benefit will result from Section 25 if the injunction is lifted, Act 11's transfer of the $4 billion from the TAA is not the source of additional monies for this benefit. The monies for this benefit have already been placed in the WRS to pay for the retirement benefits of the employee. As is set forth in the briefs of each of the parties to this action, the retirement benefit being funded will always equal or exceed a money purchase retirement benefit – the amount deposited on behalf of the employee in the employee reserve, as well as an equal amount from the employer reserve. The money to pay the full death benefit as provided by

Section 25 is, therefore, already "allocated" for the employee within the WRS.[2]

The State Respondents also cite to a legislative analysis as support for their argument that the increase in death benefits for those dying prior to age 55, as well as the lifting of the 5% interest cap, are monetary benefits funded by the TAA transfer. However, the analysis they cite references possible changes in contribution rates that may occur as a result of these benefit improvements. State Respondents' Response, p. 3. This does not tie these benefits to Act 11's funding mechanisms. It ties them to the statutory funding mechanisms already in place in the statutes. Furthermore, the fact that the legislature was presented the potential effects of the various provisions of Act 11 in a single chart (with each provision dealt with separately) does not tie the increased death benefit provision (or the provision dealing with the 5% cap) to the $4 billion transfer of

[2] Furthermore, there is no indication in any of the actuarial documents for the WRS that the actuaries take into account the "return" of monies allocated for the retirement of an employee who happens to die before reaching age 55.

Act 11 or prove that the legislature considered the provisions to be part of an integrated whole from which provisions may not be severed. Neither the language of the legislature, nor the effect of the various provisions, show an intent of the legislature to link the viability of these provisions to the viability of the other provisions of Act 11. Such an intent must be present before a court may limit severability.

Finally, the harm to persons who die before age 55 and before the injunction is lifted is clearly irreparable. The public employees of Wisconsin ought to be able to make fully informed preparations in case of their deaths prior to age 55, this includes planning the distribution of their assets at death. The amount of the death benefit from the WRS is an important ingredient in estate planning. Such employees cannot rework their wills and their beneficiary designations after their deaths. The SEA's argument that the monies that would have been

due these persons can simply be calculated after the entire case has been resolved does not solve the estate planning issues. The harm is clearly irreparable.

II. SECTION 14, WHICH OPENS THE VARIABLE ANNUITY FUND TO PRESENT EMPLOYEES, IS UNRELATED TO ACT 11's FUNDING MECHANISMS.

The State Respondents also assert that Section 14, which reopens the variable annuity division to present employees, is not severable because "it has an economic impact considered by the legislature in crafting the accompanying funding mechanism." State Respondent's Response, p. 4. They base this conclusion on a concern expressed by the actuary that there might be some difficulties handling the opening of the variable if the 5% cap is not lifted. This concern by the actuary did not result in any language in the statute connecting the 5% cap provision to the opening of the variable. And the concern certainly did not tie the opening of the variable to the $4 billion transfer from the TAA. An alleged concern is not enough to overcome the presumption of severability

where there is no actual link between the provisions and there is no demonstration of a "manifest intent of the legislature." Wis. Stat. § 990.001.

III. SECTION 12, WHICH LIFTS THE 5% INVESTMENT EARNINGS CAP, IS NOT FUNDED BY THE $4 BILLION TRANSFER

Finally, the State Respondents assert that Section 12's lifting of the 5% interest earnings cap is tied to the funding mechanisms of Act 11.[3] Again, however, the State Respondents cite to actuarial reports that indicate contribution rates might rise slightly if Section 12 is enacted. They cite to no authority that the Section is intended to be funded by Act 11's transfer from the TAA. The lifting of the earnings cap is prospective only; it will be funded pursuant to statute by contribution rates set by the actuary -- the same way the benefits of those unaffected by the cap are now funded.

[3]The State Respondents also assert that Section 12 cannot be implemented without ambiguity unless Section 11 is also implemented. If the Court believes that such is the case, the injunction should also be dissolved as it applies to Section 11 of Act 11.

There is no tie between the $4 billion transfer of Act 11 and the lifting of the 5% cap in Section 12. The fact that the $4 billion transfer may for a limited period lessen any contribution rate increases by the lifting of the cap, does not inextricably link the cap and the transfer. There is no indication that the legislature intended to fund full interest payments to post-1984 employees in any different manner than it funds the benefits for those who have been working since prior to 1984 and have not been affected by the cap. They will be funded with future employee and employer contributions.

The approach taken by State Respondents would prevent the severing of any provision of an act which contains various provisions on a single issue. Some effect can always be able to be found between the provisions; an effect does not, however, mean that the provisions cannot stand on their own. For a court to declare that an act's provisions to be not severable, there must be clear evidence that the provisions cannot stand on their own or that the legislature only

intended to enact one provision as part of a greater entirety. Neither the SEA nor the State Respondents can show such a link between the $4 billion transfer of Act 11 and the provisions at issue in this case.

WHEREFORE, WEAC respectfully requests that the Court dissolve the existing injunction as it applies to sections 12, 14, 25, and 26 of 1999 Wisconsin Act 11.

Dated this 28th day of December, 2000.

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